88-2020

Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OTIS HINDMAN,

Petitioner

v.

THE CITY OF PARIS, *et al.*,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIM D. LOVETT *
LOVETT & PAYNE
501 N. Walnut
P.O. Box 904
Clarksville, Texas 75426
(214) 427-2274
Attorney for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Fifth Circuit Court of Appeals erred in holding in its per curiam opinion that Hindman I was correct and controlling as it relates to the arrest warrant secured by the Paris Police that lacked probable cause as required by Texas law and federal due process.

2. Whether the Fifth Circuit Court of Appeals erred in deciding this case per curiam in that it involves significant legal issues relating to the "law of the case doctrine".

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons were parties to the proceeding of this case in the Fifth Circuit Court of Appeals.

Otis Hindman, Plaintiff

The City of Paris, Texas, Defendant

Charles G. Whitley, Defendant

Andrew Smith, Defendant

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v.

THE CITY OF PARIS, *et al.*,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The District Court did not write an opinion from the original trial in Hindman I. The opinion of the Fifth Circuit Court of Appeals on Hindman I is reported at 746 F.2d 1063. On retrial of Hindman II, the District Court again did not write an opinion. The opinion of the Fifth Circuit Court of Appeals in Hindman II is a non-published per curiam opinion.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to

28 U.S.C. § 1254(1).

42 U.S.C. § 1983.

STATUTES AND CONSTITUTIONAL PROVISIONS

Fifth Circuit Court of Appeals Local Rule 47.5.

Texas Penal Code, Section 31.03.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case spans eleven years. Otis Hindman, Petitioner/Plaintiff, was arrested on January 20, 1978 for receiving and concealing stolen property and certain tires were seized by the police from his Exxon station inventory. No proof was produced that the tires were stolen and formal charges were never filed against Mr. Hindman, who was factually innocent of any crime in any event. A § 1983 civil rights case was filed against the city of Paris, Texas and the officers individually. The first trial was bifurcated with the liability issues being tried in 1981 and damage issues tried in 1983. The trial court entered judgment for the Plaintiff. The Fifth Circuit Court of Appeals reversed this judgment in 1984 and remanded it for a new trial. (Hindman I.)

The case was retried in 1987 on a different theory of liability. Hindman I was tried on the theory that factual misrepresentations by the defendant police officers invalidated both the search and arrest warrants that had been jointly (and customarily) issued. Hindman II was retried on the sole issue that there was no probable cause factually or as stated in the affidavit to support the arrest warrant. The jury in Hindman II responded to special interrogatories that Hindman contended should have given him judgment on his theory presented during the retrial. However, based upon the Hindman I opinion the trial judge entered a take nothing judgment for the Defendants, although the jury findings clearly supported Hindman's position that no probable cause existed for issuance of the arrest warrant.

On appeal in Hindman II, the Fifth Circuit Court of Appeals avoided the substance and essence of Mr. Hindman's issues. It simply entered a per curiam opinion declaring that the Hindman I opinion was correct and controlling in this matter. Hindman filed a motion for rehearing with the Fifth Circuit Court of Appeals which

was subsequently denied on March 14, 1989. Hindman now appeals to this Court through Writ of Certiorari.

SUMMARY OF THE ARGUMENT

1. Decisions of this Court have guaranteed individual civil rights in this country. It is beyond dispute today that an individual cannot be arrested without probable cause. The Fifth Circuit Court of Appeals has used its per curiam opinion to circumvent such precedents set by this Court. This Court must examine the Fifth Circuit's per curiam opinion and reverse and remand to have it reexamine the decision in Hindman I. No probable cause existed for Hindman's arrest and the Fifth Circuit was obviously wrong in Hindman I in its interpretation of the affidavit involved. By allowing this decision to remain intact, it will allow the Fifth Circuit to undermine this court's precedents and probable cause standards for arrest warrants.

2. The Fifth Circuit has used the per curiam opinion and misused the law of the case doctrine to circumvent the necessary issues that must be discussed in Hindman's second appeal. It has thereby avoided admitting its mistake in Hindman I. The Fifth Circuit's use of the law of the case doctrine is also in conflict with this Court and other circuits. This constitutes abuse that denies the petitioner an opportunity to be heard and for justice to be done. This is another method for the Fifth Circuit to whitewash civil rights litigation and deny an individual that personal freedom which this Court has sought to maintain. This misuse of the per curiam opinion and the law of the case must be corrected.

REASONS FOR GRANTING THE WRIT

1. Whether the Fifth Circuit Court of Appeals erred in holding in its per curiam opinion that Hindman I was correct and controlling as it relates to the arrest warrant secured by the Paris Police which lacked prob-

able cause as required by Texas law and federal due process of law.

The Affidavit used to support the arrest warrant in question did not meet the standards required by Texas law and federal due process of law for stating probable cause. The affidavit states:

> "Affiant, Detective Andrew Smith is employed by the City of Paris Police Department and is currently assigned to the Investigation Division. Affidavit Detective Andrew Smith has seen approximately 17 Fleetwood automobile tires in said location within the 24 hours and has personally observed Otis Hindman in possession of said 17 tires. Affiant knows that Hardy Oil Company is the only Fleetwood Tire dealership in the Northeast Texas area. On the 18th day of January, 1978, E.G. Hardy reported approximately 300 Fleetwood Tires were stolen from him (sic) warehouse at 564 Lamar Avenue in Paris, Texas. Affiant further received information from a confidential informant that a black man has been selling these tires for $25.00 each to individual service stations in Lamar County Area. Confidential informant has given affiant information for the past six months dealing with burglary and theft and on each and every occasion information is said to be true and correct."

Based upon this affidavit, Paris police officers Smith and Whitley secured a combination search and arrest warrant. Petitioner Otis Hindman was arrested for receiving and concealing stolen property and eighteen Fleetwood tires were confiscated from Hindman's tire inventory at his Exxon station.

The Tex. Penal Code Ann. § 31.03 (Vernon 1984) provides the following:

> "(b) obtaining or exercising control over property is unlawful if (f) the property is stolen and the actor obtains it from another or exercises control over the property obtained by another *knowing* (emphasis added) it was stolen."

There is no question that probable cause is required to support an arrest warrant as set out by this Court and the Fifth Circuit Court in various opinions such as *Malley v. Briggs*, 475 U.S. 335 (1986), *Monroe v. Pape*, 365 U.S. 167 (1961) *overruled on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978) *Gerstien v. Pugh*, 420 U.S. 103 (1974); *Nesmith v. Alford*, 318 F.2d 110 *reh'g denied*, 319 F.2d 859 (5th Cir. 1963) *cert. denied*, 375 U.S. 975 (1964); *Davis v. Turner*, 197 F.2d 847 (5th Cir. 1952); *Crane v. Texas*, 759 F.2d 412, *amd., reh'g denied, en banc*, 766 F.2d 193 (5th Cir. 1985), *cert. denied*, 474 U.S. 1020 (1985).

It is also beyond dispute in Texas that probable cause must be separately stated to support an arrest warrant combined with a search warrant. *Pecina v. Texas*, 516 S.W.2d 401 (Tex.Crim.App. 1974). This principle of law was well established for many years before Hindman's arrest in January, 1978, and was or should have been well known by Texas police officers.

The affidavit in no way met the requirements for probable cause set out by this Court. The Affidavit fails to state probable cause in that:

> —it fails to state that the tires in Hindman's possession were stolen or even believed to be stolen.
>
> —it fails to state either that Hindman knew the tires to be stolen or that Hindman refused to explain the possession of stolen property (indeed, the tires in Hindman's possession were never proven to be stolen, never identified as being from Hardy Oil Co., and no formal charges were ever filed against Hindman after he had been ARRESTED.)
>
> —it fails to charge that Hindman purchased the tires from the ". . . black man (who) has been selling these tires."
>
> —it fails to charge the commission of any crime by Hindman even in the most rudimentary language

and even by giving the language its most favorable inferences in favor of the officers.

—the officers represented to the prosecutor, Tom Wells, that they sought only a SEARCH warrant (TR. 51,52,63) (not a combination with an ARREST warrant included)

—the prosecutor who helped prepare the affidavit, Tom Wells, told the officers that they would have to be able to identify the tires before there would be sufficient probable cause to ARREST Hindman (TR. 62)

—the officers ARRESTED Hindman under the warrant first and then without even attempting to identify the tires, confiscated them. (TR. 104,105)

From the uncontested evidence it is obvious that the police lied to the prosecutor. The police wanted the arrest warrant to teach Hindman a lesson. His factual innocence was as unimportant to the Paris Police Department as was this Court's requirement of probable cause to arrest someone. Indeed, the jury, in the record of the Hindman trial found no probable cause existed for Hindman's arrest, and that such illegal arrest warrants were customarily secured by the Paris Police Department through search warrants. Therefore, in the appeal of Hindman I, the Fifth Circuit overturned the fact finder in that they held "that the Magistrate may have concluded there was probable cause to believe that Hindman's tires were stolen from Hardy and sold to Hindman under sufficiently suspicious circumstances, that Hindman knew or should have known they were stolen with this necessary link, the warrant adequately if barely demonstrates probable cause for the search and arrest."

In Hindman I, the Fifth Circuit was wrong if it actually intended to hold that the affidavit in question established probable cause for an arrest. In Hindman I, the Fifth Circuit did not properly consider the probable

cause for arrest issue since it was not raised in that appeal. That opinion properly considered only whether the trial judge should have permitted the jury to decide the evidence concerning the truthfulness of the officers' factual representations in the affidavit. The Hindman I language was too broadly stated concerning the matter of adequate probable cause for the arrest. The objectionable language constitutes dicta and was certainly not binding upon the plaintiff in the retrial.

The Petitioner at this time takes no issue with the portion of the Hindman I opinion holding that there was probable cause stated (if truthful) for a search warrant. There were sufficient facts alleged which, if true, would establish probable cause for a search. However, there was no probable cause alleged to issue an arrest warrant for Otis Hindman.

This Court must consider that portion of the Hindman decision concerning the arrest warrant because this opinion is greatly in conflict with the holdings of this Court and other circuits around the country concerning the due process requirement of probable cause to arrest someone. See *Gerstein v. Pugh*, 420 U.S. 103, (1974); *United States v. Haala*, 532 F.2d 1324 (10th Cir. 1976).

This Court held in *Gerstein v. Pugh* that the standard for arrest are probable cause defined in the terms of facts and circumstances "sufficient to warrant a prudent man in believing that [suspect] had committed or was committing an offense". *Gerstein v. Pugh* at 64.

The Tenth Circuit, in *United States v. Haala*, follows this Court's decisions concerning the standard for arrest being probable cause. It also explains that this standard like those searches and seizures, represents a necessary accommodation between the individual's right to liberty and the state's duty to control crime. That accommodation may be lost if the Hindman I opinion remains intact because of the Firth Circuit's mistaken belief that the

affidavit in question establishes probable cause for an arrest warrant.

Because of the decision of the Fifth Circuit, Mr. Hindman's civil rights have been violated. He has gone through the torture, embarrassment and humiliation of being arrested and jailed. Though no indictment was issued and he was released without formal charges ever being filed, his reputation in a small, northeast Texas community has been ruined because of the blatant and customary disregard of the rights of individuals by the City of Paris, Texas and the Paris Police Department.

This Court should not allow the Fifth Circuit Court of Appeals, in its dogmatic and authoritarian fashion, to obstruct the individual civil rights of persons in this area. This Court has recently criticized the Fifth Circuit on this very issue of civil rights in *Texas State Teachers Assocation v. Garland Independent School District*, 837 F.2d 190 (1989), and *Blanchard and Bergeron*, 103 L.Ed.2d 67 (1989). In each of these cases, this Court struck down decisions of the Fifth Circuit on standards for limiting attorney's fees in civil rights litigation. The standards used by the Fifth Circuit and the Eleventh Circuit were making civil rights litigation on the Appellate level dfficult to impossible for most persons. In *Texas State Teachers Association*, infra, this Court held that the standards used by the Fifth and Eleventh Circuits to limit fees to attorneys when civil rights plaintiffs do not win on their "central issue" were held invalid. In *Blanchard v. Bergeron*, infra, this Court held unanimously that the Fifth Circuit was wrong to treat contingent fee arrangements in civil rights cases as an automatic cap on any amount the Court can award in fees.

The Fifth Circuit Court of Appeals has displayed hostility toward civil rights litigation. Once again, by using the per curiam opinion to avoid discussions of the real issues and thereby apparently furthering the discouragement of civil rights actions.

To allow the opinion in Hindman I to remain undisturbed through Hindman II would create an entire new standard for probable cause in the Fifth Circuit and the United States, undermining this Court's decisions. Allowing the decision in Hindman I to stand will create a frightenng scenario wherein arrest warrants are easily obtainable without the necessity of probable cause.

2. Whether the Fifth Circuit Court of Appeals erred in deciding this case per curiam in that it involves significant legal issues involving law of the case doctrine.

5th Cir. R 47.5 [1] of the Fifth Circuit Court of Appeals provides for a per curiam opinion when the opinion has no precedential value and merely decides particular cases on the bases of "well-settled principles".

There were significant legal issues which needed to be addressed in the Hindman II opinion. The abusive use of a per curiam opinion by the Fifth Circuit which cites no law or precedent to support its decision allows them to evade the issues brought about on this appeal. It is important that either these issues be considered by this Court or that the Fifth Circuit be forced to reconsider its decision in Hindman I and to examine the following issues.

1. Whether the arrest warrant involved was supported by adequate probable cause. This Court has to consider this point carefully because of the precedential value of this decision in both criminal law and civil rights litigation. Otherwise, considerable harm will be done to the standards set by this Court on what constitutes probable cause to support an arrest warrant. Question 1, above, addressed this issue in detail.

2. Should this Court allow the Fifth Circuit's opinion in Hindman II to remain unchallenged concerning the law

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[1] Local Rule 47.5 provides for the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession.

of the case doctrine since it would be directly in conflict with this Court's ruling in *United States v. United States Smelting & Mining Company*, 339 U.S. 186, *reh'g denied*, 339 U.S. 972 (1950), which held the rule to be a discretionary rule of practice.

The law of the case doctrine should in no way preclude the Fifth Circuit from reviewing, modifying or changing its former opinion in a case when it was obvious that the opinion was wrong. *Potomac Passengers Association v. Chesapeake and Ohio Railway Company*, 520 F.2d 91 (D.C. Cir. 1975), held the law of the case doctrine to be discretionary and the D.C. circuit court corrected its prior opinion when that opinion was shown to be incorrect.

The Fifth Circuit is also in conflict with the Eighth Circuit Court concerning the application of the law of the case doctrine. The Eighth Circuit in *Pyramid Life Insurance v. Curry*, 291 F.2d 411 (8th Cir., 1961), held:

> "The law of the case rule does not apply if the evidence on the later trial is substantially different from that on the former trial."

The doctrine of the "law of the case" cannot be involved where an appellate court, in a second appeal, corrects the entry of its former judgment so as to make it express the true decision of the case. *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1978).

The doctrine of "law of the case" does not preclude the court, on the second appeal, from construing it's former opinion. *Peek v. Women's Home Missionary Society*, 504 Ill. 427, 136 N.E. 772 (1962), and *Hoggesang v. Selner*, 232 Ky. 503, 23 S.W.2d 945 (1941).

It is well established, that a defense not available to defendant on his former appeal is not foreclosed by the former appellate decision in the case. Likewise, a former decision is not conclusive when the evidence is substantially different in the second trial. *Carpenter v. Durrell*,

90 F.2d 57 (6th Cir. 1937), *cert. denied*, 302 U.S. 721, (1937). *Seattle v. Puget Sound Power and Light Company*, 15 F.2d 794 (9th Cir. 1927), *cert. denied*, 273 U.S. 752 (1927).

The law of the case doctrine should not prohibit the Fifth Circuit Court of Appeals from making the proper interpretation of the affidavit used to support the arrest warrant. As a matter of law, the affidavit and the arrest warrant attached thereto were invalid because they did not contain the information necessary and that was required by law to support probable cause for an arrest. Additionally, the Plaintiff secured a factual finding from the jury in Hindman II that no probable cause existed to arrest Mr. Hindman. (Tr. Page 624).

It is therefore reasonable, using the same logic used in these cited cases to extend the above holdings and ideas to theories that were not available to the Plaintiff on his first appeal. Because of the holding of Judge William Wayne Justice in Hindman I, which ruled out the entire affidavit and the validity of both the search and arrest warrant based upon the untruthfulness of the officers, the plaintiff's position on the inadequacy of the probable cause stated in the affidavit vis-a-vis the arrest warrant was not raised on appeal until Hindman II. The Fifth Circuit used the per curiam opinion in Hindman II to avoid addressing that issue.

CONCLUSION

The Petitioner prays that this Court recognize the obvious defects and conflicts in the decisions of the Fifth Circuit in Hindman I and Hindman II. The very decision making power of this Court is being tested by the Fifth Circuit, who by their decisions in this matter have challenged the precedential decisions of this Court concerning both the due process standards of probable cause and the application of the "law of the case doctrine."

For the reasons set out above, Petitioner prays that the judgment of the Fifth Circuit Court of Appeals be reversed and remanded for further proceedings.

Respectfully submitted,

JIM D. LOVETT *
LOVETT & PAYNE
501 N. Walnut
P.O. Box 904
Clarksville, Texas 75426
(214) 427-2274
Attorney for Petitioner

* Counsel of Record

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2445

OTIS HINDEMAN,
Plaintiff-Appellant,

versus

THE CITY OF PARIS, TEXAS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(CA-P-78-17)

(February 15, 1989)

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM: *

This section 1983 case was reviewed by this court in 1984 and remanded for retrial. Hindman v. City of Paris, Texas, 746 F.2d 1063 (5th Cir. 1984) (Hindman

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I). The facts and legal issues are stated at length in that opinion and we will not repeat them here.

In Hindman I, we held that the justice of the peace had probable cause to issue the warrant for plaintiff's arrest. We concluded, however, that the district court erred in taking from the jury the question of whether the defendant police officers "intentionally or recklessly misled the county attorney and the Justice of the Peace" in issuing the warrant. Id. at 1067.

On remand, the case was completely retried and the district court submitted the above question to the jury in precisely the form we suggested in Hindman I. The jury answered that question in the negative. The distrist court, as directed by Hindman I, correctly entered a take nothing judgment in favor of the defendant police officers and the City of Paris, Texas.[1] Appellant's argument on appeal focuses on the jury's finding following retrial that the warrant was issued without probable cause. But we decided in Hindman I that probable cause existed as a matter of law for issuance of the warrant. Consequently. this issue was not subject to retrial and the jury's finding on this question must be disregarded.[2]

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[1] The jury answered several other interrogatories favorable to the plaintiff. These included findings that the arrest warrant was issued without probable cause; the City had an official policy of secured arrest warrants without probable cause and Hindman was damaged to the extent of $30,000. The district court initially entered judgment in favor of Hindman on that verdict. On reflection, however, and after considering the jury's finding that the police officers did not intentionally or recklessly mislead the justice of the peace, the district court granted the defendant's motion for judgment notwithstanding the verdict and entered a take nothing judgment in favor of the defendants.

[2] If, as Hindman may contend, the last trial was not on the earlier urged theory that the warrant of seizure/arrest was invalid because of confusion/uncertainty on the identity of the reliable informant so that the issue (and answer) was both unnecessary

In sum, the district court submitted a critical factual issue to the jury according to our instructions in Hindman I and the jury resolved that issue against the plaintiff/appellant. In light of that finding, the district court correctly entered judgment for all defendants.

AFFIRMED.

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and irrelevant, this is of no help to the appellant. At most the issue (and answer) was superfluous. The holding in Hindman I that the affidavit afforded probable cause for the issuance of the warrant of search and arrest decisively determines the critical issue on the new supposed theory.

UNITED STATES COURT OF APPEALS
FIFTH CRICUIT

No. 83-2495

OTIS HINDMAN,
Plaintiff-Appellee,
v.

THE CITY OF PARIS, TEXAS, ANDREW SMITH,
and CHARLES G. WHITLEY,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas

Nov. 19, 1984

T.K. Haynes, City Atty., Hardy Moore, Paris, Tex., for The City of Paris, Tx.

J.D. McLaughlin, Paris, Tex., for Smith & Whitley.

Jim D. Lovett, James R. Rodgers, Paris, Tex., for plaintiff-appellee.

Before BROWN, TATE, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The city of Paris, Texas and two Paris police offficers appeal from a judgment entered against them for violat-

ing Hindman's civil rights in the course of obtaining and executing a warrant of arrest. In a bifurcated trial of liability and damages, a jury found that Hindman had been arrested without probable cause, and that the arresting officers had not acted in good faith. Eighteen months later, a different jury awarded Hindeman $50,450 in damages. Persuaded that the trial judge should not have taken from the first jury the factual issue of whether the officers deceptively obtained the warrant used to arrest Hindman, we reverse and remand for a single trial of both liability and damages.

I

E.G. Hardy owns the Hardy Oil Company of Paris, Texas, a distributor of Fleetwood brand tires in Northeast Texas. Hardy's stepson, Stan, worked at Hardy Oil as a tire salesman. Frederick Reed, a black man also did "odd jobs" at Hardy Oil. In late 1977 or early 1978, Stand Hardy apparently decided to make some extra money. Without his father's permission, Stan took Fleetwood tires from the warehouse and gave them to Reed to sell, with Stan and Reed splitting the proceeds. Among those who brought tires from Reed was Otis Handman, who runs an Exxon station in Paris.

On January 18, 1978, E.G. Hardy reported to Charles Whitley, assistant chief of the Paris Police, that he had lost 200 to 300 tires, that he had been told that Reed had been stealing the tires, and that he believed that 20 to 30 of the tires were at Hindman's Exxon station. Whitley asked Officer Bobby Hundley to pay an "undercover" visit to Hindman's service station. Hundley reported back that he had seen Fleetwood tires in a back storeroom. Whitley then assigned Detective Andrew Smith to the case.

On Friday, January 20, Smith went to the service station and spoke with Hindman. Hindman told Smith that he had Fleetwood tires for sale, and that he had

bought them for cash, from a black man. Hindman showed Smith the tires. Smith then asked if Hindman would accompany him to the station and identify the black man's picture is a "mug shot" book. Hindman declined, stating that he feared identifying the wrong man. He offered to identify a suspect in person.

Smith then began to confiscate the tires. Hindman objected, and asked that E.G. Hardy first be brought to the station to identify the tires. Smith said that this was not necessary. Smith then agreed to leave the tires at the station upon Hindman's assurances not to dispose of the tires. Smith later testified that Hindman appeared to be nervous during this encounter.

Smith returned to the police station and reported to Whitley. The two then went to the county attorney's office. They asked the county attorney to prepare an affidavit for a search and arrest warrant.

In the affidavit of January 20, Smith[1] swore that: (1) Smith had within the past twenty-four hours seen 17 Fleetwood tires at Hindman's service station and "personally observed Otis Hindeman in possession of the tires"; (2) E.G. Hardy had on January 18 reported the theft of 300 Fleetwood tires from his Paris warehouse; (3) Smith knew "that Hardy Oil Company is the only Fleetwood Tire dealership in the North East Texas area"; (4) Smith "received information from a confidential informant that a black man has been selling these tires for $25.00 each to individual service stations in Lamar County area"; (5) "Confidential informant has given Affidavit information for the past six months dealing with burglary and theft and on each and every occasion informant is said to be true and correct."

Smith and Whitley took the affidavit to a Justice of the Peace, who issued the warrant. They then returned

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[1] Although Smith's name was on the affidavit, Whitley testified at trial that he had supplied the facts to the county attorney.

to the service station in an unmarked car, arrested Hindman for knowingly possessing stolen goods, and seized the tires.

The two policemen took Hindman to the station, and photographed and fingerprinted him. Hindman was held for about one hour until being released into his attorney's custody. On Monday, when Hindman appeared in court, he was told that the charges had been dropped. E.G. Hardy had requested that all charges be dismissed after learning that his stepson would have to be prosecuted if Reed or Hindman was.

In April of 1978, Hindman filed this § 1988 suit against Whitley, Smith, and the City of Paris, claiming his arrest was unlawful. Over defendant's objection, the district court bifurcated the liability and damages phases.

At the first trial, the county attorney testified that he understood the affidavit to mean that a single confidential informant had told the police about the black man selling tires and had given them other reliable information in the past. At trial, Whitley testified that E.G. Hardy was the informant who had told of the black man selling tires. Whitley stated that E.G. Hardy was also the informant who had given reliable information in the past.

Whitley was then confronted with his deposition testimony, in which he had said that although Hardy was the informant about the tire seller, a different person had given reliable information in the past. Despite his deposition testimony, Whitley continued to insist that the affidavit referred to only one informant, E.G. Hardy. Later, E.G. Hardy was called to the stand. On cross-examination by Hindman's attorney, Hardy denied that he was the informant who had given the police information dealing with burglary and theft in the six months preceding the theft.

Before the case on liability went to the jury, the district court ruled as a matter of law that the search warrant was invalid. It gave the following explanation to counsel:

> I can also state for the record that I consider the Chief of Police's testimony that the confidential informant was the owner of the tires to be inaccurate and misleading. . . .
>
> I find the search warrant is invalid because (1) it does not establish the reliability of the principal witness in the face of the search warrant, the principal witness being the owner of the tires; secondly, I find that the so-called confidential informant was not as testified to by the Chief of Police, the owner of the tires; hence, the search warrant fails. The warrant of arrest is invalid because there is no allegation that the plaintiff in this case knew the property to be stolen or had reasonable grounds to believe it was stolen.

The court instructed the jury not to consider the warrant as a justification for the search and arrest. During its deliberations, the jury sent a note to the judge asking why he had ruled the warrant invalid. The judge replied, citing the same reasons he had given to counsel.

The jury then answered special interrogatories as follows: (a) Smith and Whitley did not have probable cause to arrest Hindman; (b) Smith and Whitley "acted in personal good faith and with a reasonable belief in the constitutional validity of the arrest"; (c) Smith and Whitley "knew, or reasonably should have known, that in arresting plaintiff at the time and on the occasion in question [they] violated the settled and unquestioned constitutional rights of plaintiff"; (d) that it was a custom and practice of the City of Paris police to secure arrest warrants without probable cause, "through the device of

applying for a search warrant with an arrest warrant incidentally therein"; (e) that it was a custom and practice of the Paris police to make arrests without probable cause. The district court ruled that these answers established liability against the defendants.

At the second trial, the district court instructed a new jury that a previous jury had found that the defendants had violated Hindman's "settled and unquestioned constitutional rights." The second jury, after hearing evidence, awarded Hindman $50,000 for past and future mental anguish and harm to reputation, and $450 for the loss of the tires.

II

1

The city and police officers argue that the search warrant was valid, that E.G. Hardy was the confidential informant whose reliability had been proved, and that the trial court was "wholly without justification" in instructing the jury otherwise. Hindman responds that it was "glaringly apparent" that Hardy was not the informant who had supplied reliable information in the past, and that the warrant was therefore invalid.

If it were true that Whitley and Smith had two separate informants in mind when they had the affidavit prepared, then we would agree that the warrant was invalid as a matter of law. On its face, the warrant's statement that a confidential informant had supplied correct information in the past is meant to bolster the confidential tip about the tire theft referred to in the preceding sentence. If the officers knew that the trustworthy informant was not the person who had given them information about the tire theft, and yet signed the affidavit as it was, they intentionally or recklessly misled the county attorney and the Justice of the Peace. Under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57

L.Ed.2d 667 (1978), statements in an affidavit based on intentional or reckless misrepresentations must be struck, and the warrant's validity then judged based on its remaining contents. We would then disregard the statement concerning the confidential informant's trustworthiness.

The remainder of the affidavit avers only that Fleetwood tires had been stolen from Hardy Oil Company, that Hardy was the only Fleetwood dealer in the area, that Hindman had Fleetwood tires in his possession, and that an informant of unstated reliability had said that the stolen tires had been sold to service stations in Paris. There is no corroborating evidence that Hindman's tires were the ones that had been stolen, or that Hindman knew that the tires had been stolen. Without such corroboration, the unknown informant's tip does not provide sufficient probable cause to tie Hindman to the crime. *Cf. Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 2334-35, 76 L.Ed.2d 527 (1983) (independent corroboration may allow reliance on anonymous informant of unknown veracity).

If, however, E.G. Hardy was the only informant in the officers' minds whey they prepared the affidavit and obtained the warrant, we would hold the warrant valid. With the addition of an assertion that the tip about the sale of the stolen tires to Hindman by an unauthorized person at a presumably cheap price had come from a *reliable* informant, a magistrate could find that tip probative. *See Gates*, 103 S.Ct. at 2329, *citing United States v. Sellers*, 483 F.2d 37 (5th Cir.1973). The magistrate may have concluded there was probable cause to believe that Hindman's tires were stolen from Hardy and sold to Hindman under sufficiently suspicious circumstances, that Hindman knew or should have known they were stolen. With this necessary link, the warrant adequately, if barely, demonstrates probable cause for the search and arrest. The key question, then, was whether Whitley and

Smith were referring to two different people in the last two sentences of the affidavit.

The issue of the officers' truthfulness and intent at the time they applied for the warrant is one of fact. *United States v. Freeman*, 685 F.2d 942, 948 n. 3 (5th Cir. 1982); *United States v. Farese*, 612 F.2d 1376, 1377 (5th Cir. 1980). Normally, this issue presents itself at suppression hearings preceding criminal trials, and the court is necessarily the factfinder. *See, e.g., Freeman, supra; Farese, supra; United States v. Bradsby*, 628 F.2d 901, 940 (5th Cir.1980).

In the context of a § 1983 suit for unlawful arrest, however, we believe that the jury, if one is present, should be the primary factfinder. Unlike a criminal case, in a civil suit attacking the legality of an arrest, a *Franks v. Delaware* factual dispute is not preliminary to a ruling upon the admissibility of evidence. Rather, it presents a classic issue of historical fact central to the substantive issues.

When a jury is empaneled, it "is the sole judge of the facts of the case." *Garris v. Rowland*, 678 F.2d 1264, 1270 (5th Cir.), *cert. denied*, 459 U.S. 864, 103 S.Ct. 143, 74 L.Ed.2d 121 (1982). In *Garris*, we held that "where facts relied upon to show probable cause in a § 1983 action [for false arrest] are controverted, they must be resolved by the jury before controlling legal principles are applied." *Id.; see also Trejo v. Perez*, 693 F.2d 482 (5th Cir.1982). Similarly, if the facts here were sufficiently disputed to avoid a directed verdict on the issue of the officers' alleged deception, the jury should have resolved that issue before the court ruled on the affidavit's validity.[2] We therefore must decide whether

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[2] This could have been done through special interrogatories. The jury could have been asked,

> "Has the plaintiff proved by a preponderance of the evidence that Officers Smith and Whitley intentionally or recklessly mis-

the court below was correct in issuing what amounted to a directed verdict that the officers had two informants in mind.

In the first trial, Whitley testified unequivocally that E.G. Hardy was the sole confidential informant contemplated in the affidavit. Whitley stuck to this position after Hindman's counsel pointed to its inconsistency with his deposition and pointed out that Hardy was referred to by name elsewhere in the affidavit and even after Hardy took the stand and denied that he had been the confidential informant.

Although a jury might well have chosen not to believe Whitley's testimony in the face of this contrary evidence, the question of a witness's credibility is the purest of jury issues. Whitley's story, even though contradicted, was enough if the jury believed him. *See Branch v. Chevron International Oil Co.*, 681 F.2d 426, 430-31 (5th Cir. 1982) (jury question was presented by plaintiff's testimony describing scene of accident, despite defendant's testimony flatly contradicting plaintiff's description). This case, like *Branch*, is distinguishable from *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 728-29 (5th Cir. 1977), in which we found that "completely self-serving testimony, upsupported by other evidence and in the teeth of universal experience" did not present a jury question. The defendants presented some evidence that E.G. Hardy had reported crimes to the police in the past in an attempt to establish that he was the informant who had given reliable information. We are also not prepared to hold that the naming of Hardy in the affidavit placed Whitley's

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led the Justice of the Peace into believing that the affidavit referred to only one confidential informant?"

If the jury answered "Yes," it would have proceeded to answer the remaining interrogatories. If it answered "No," the jury would have been told to stop. The court would then have been obliged, as we have explained, to hold that the warrant was valid. A verdict for defendants would then have followed. *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.E.2d 433 (1979).

claim that Hardy was the confidential informant "in the teeth of universal experience." It is undisputed that Hardy *was*, at least, the "confidential informant who gave information to the police about the black man selling the tires. We hold that the district court erred when it took the issue from the jury.

2

Whether this claimed error was preserved for appeal is not immediately apparent. The pretrial order listed as a "contested issue of fact . . . 1. the facts surrounding the drafting of the second warrant . . . 3. Whether or not the search warrant refers only to one informant." The pretrial order also listed the ultimate validity of the warrant as a question of law. The officers' counsel told the jury in his opening statement that they would find that the affidavit was correct. Yet the district judge resolved the fact question and informed the jury that he had done so. When defendants' counsel was confronted with the proposed charge, he objected: "First, we object to the charge because of the court finding that the search warrant is invalid and the instruction to the jury that it is invalid." In the face of the district court's forthright and explicit ruling in a charge conference over a proposed written charge, a practice we commend, this point was preserved.

Defendants' appellate attack on the judgment is sweeping, and we are not confident as to the precise footing of all their arguments. But it is certain that the defendants, on appeal, complain of the district court's instruction to the jury that the warrant was invalid in light of the fact that the jury was also asked to determine the validity of the arrest, sans warrant, as well as the good faith of the arresting officer. The court told the jury that it found the warrant invalid because "the 'confidential informant,' in the opinion of the court, was not the owner of the tires," thereby rejecting the testimony of

Whitley. The jury found there was no probable cause for an arrest without a warrant and, despite the trial court's instruction regarding the warrant, the jury decided that the officers had acted in subjective good faith, a pre-*Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) inquiry.

The root cause of the inconsistent conclusions of judge and jury and the complained-of instruction to the jury is that the same trier of fact ought to have decided all the fact questions, intertwined as they were. We do not see how a jury can be expected to pass upon whether there was probable cause for an arrest without a warrant and whether the officer acted in good faith, now measured objectively, when they have just been told by the trial judge that he did not believe the officers and there was no probable cause for a warrant. We could rest on appellants' quarrel with the trial court's telling the jury of the factual grounds for his ruling. But this error, and it was, is only a manifestation of the more basic difficulty of not submitting to the jury the factual disputes regarding the warrant. Whether the error be viewed as the judge telling the jury that he did not believe Whitley or in not submitting to the jury all fact issues, defendants would be entitled to a new trial. We prefer to reach through to the underlying error and thereby correct not only the error here but also prevent its repetition.

III

The city urges that it could not be liable even if the arrest were illegal because proof of policy or custom was not made, as required by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The jury found in answer to a special interrogatory that: "It was a custom and practice of the Paris Police Department at the time of Hindman's arrest to secure warrants of arrest without a showing of probable cause through the device of applying for a

search warrant with an arrest warrant incidentally included therein, and that their practice directly caused plaintiff to be deprived of a settled and unquestioned constitutional right."

After this case was tried, we explicated the application of *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) in our circuit. *See Webster v. City of Houston*, 735 F.2d 838 (5th Cir. 1984) (en banc); *Bennett v. Slidell*, 728 F.2d 762 (5th Cir.1984) (en banc). While Hindman's burden will be difficult, because this case must be tried again in a single trial on liability and damages in any event, we are persuaded that Hindman ought to be afforded the opportunity to prove that the city is liable under *Monell*, as explained in *Webster* and *Bennett*, leaving to the trial judge to decide in the first instance whether a jury question is made out.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2445

OTIS HINDMAN,
Plaintiff-Appellant,

versus

ANDREW SMITH, CHARLES G. WHITLEY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING

(March 14, 1989)

Before BROWN, JOHNSON, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

STATUTORY PROVISIONS INVOLVED

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub.L. 100-325, § 2(a), (b), 102 Stat. 662.)

42 U.S.C. § 1983.

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. As amended Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

TEXAS PENAL CODE

§ 31.03. Theft

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

(b) Appropriation of property is unlawful if:

(1) it is without the owner's effective consent;

(2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or

(3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

(c) For purposes of Subsection (b) of this section:

(1) evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty;

(2) the testimony of an accomplice shall be corroborated by proof that tends to connect the actor to the crime, but the actor's knowledge or intent may be established by the uncorroborated testimony of the accomplice;

(3) an actor engaged in the business of buying and selling used or secondhand personal property, or lending money on the security of personal property deposited with him, is presumed to know upon receipt by the actor of stolen property (other than a motor vehicle subject to Article 6687-1, Vernon's Texas

Civil Statutes) that the property has been previously stolen from another if the actor pays for or loans against the property $25 or more (or consideration of equivalent value) and the actor knowingly or recklessly:

(A) fails to record the name, address, and physical description or identification number of the seller or pledgor;

(B) fails to record a complete description of the property, including the serial number, if reasonably available, or other identifying characteristics; or

(C) fails to obtain a signed warranty from the seller or pledgor that the seller or pledgor has the right to possess the property. It is the express intent of this provision that the presumption arises unless the actor complies with each of the numbered requirements;

(4) for the purposes of Subdivision (3)(A) of this subsection, "identification number" means driver's license number, military identification number, identification certificate, or other official number capable of identifying an individual;

(5) stolen property does not lose its character as stolen when recovered by any law enforcement agency;

(6) an actor engaged in the business of obtaining abandoned or wrecked motor vehicles or parts of an abandoned or wrecked motor vehicle for resale, disposal, scrap, repair, rebuilding, demolition, or other form of salvage is presumed to know on receipt by the actor of stolen property that the property has been previously stolen from another if the actor knowingly or recklessly:

(A) fails to maintain an accurate and legible inventory of each major motor vehicle component part purchased by or delivered to the actor, including the date of purchase or delivery, the name, age, address, sex, and driver's license number of the seller or person making the delivery, the license plate number of the motor vehicle in which the part was delivered, a complete description of the part, and the vehicle identification number of the motor vehicle from which the part was removed, or on lieu of maintaining an inventory, fails to record the name and certificate of inventory number of the person who dismantled the motor vehicle from which the part was obtained;

(B) fails on receipt of a motor vehicle to obtain a certificate of authority, sales receipt, or transfer document as required by the Texas Litter Abatement Act (Article 4477-9a, Vernon's Texas Civil Statutes), or a certificate of title showing that the motor vehicle is not subject to a lien or that all recorded liens on the motor vehicle have been released; or

(C) fails on receipt of a motor vehicle to immediately remove an unexpired license plate from the motor vehicle, to keep the plate in a secure and locked place, or to maintain an inventory, on forms provided by the State Department of Highways and Public Transportation, of license plates kept under this paragraph, including for each plate or set of plates the license number and the make, motor number, and vehicle identification number of the motor vehicle from which the plate was removed; and

(7) an actor who purchases or receives a used or secondhand motor vehicle is presumed to know on

receipt by the actor of the motor vehicle that the motor vehicle has been previously stolen from another if the actor knowingly or recklessly:

(A) fails to report to the State Department of Highways and Public Transportation the failure of the person who sold or delivered the motor vehicle to the actor to deliver to the actor a properly executed certificate of title to the motor vehicle at the time the motor vehicle was delivered; or

(B) fails to file with the county tax assessor-collector of the county in which the actor received the motor vehicle, not later than the 20th day after the date the actor received the motor vehicle, the registration license receipt and certificate of title or evidence of title delivered to the actor in accordance with Section 2, Chapter 364, Acts of the 50th Legislature, Regular Session, 1947 (Article 6687-6, Vernon's Texas Civil Statutes), at the time the motor vehicle was delivered.

(d) It is not a defense to prosecution under this section that:

(1) the offense occurred as a result of a deception or strategy on the part of a law enforcement agency, including the use of an undercover operative or peace officer;

(2) the actor was provided by a law enforcement agency with a facility in which to commit the offense or an opportunity to engage in conduct constituting the offense; or

(3) the actor was solicited to commit the offense by a peace officer, and the solicitation was of a type that would encourage a person predisposed to commit the offense to actually commit the offense, but

would not encourage a person not predisposed to commit the offense to actually commit the offense.

(e) Except as provided by Subsection (f) of this section, an offense under this section is:

(1) a Class C misdemeanor if the value of the property stolen is less than $20;

(2) a Cass B misdemeanor if:

(A) the value of the property stolen is $20 or more but less than $200; or

(B) the value of the property stolen is less than $20 and the defendant has previously been convicted of any grade of theft;

(3) a Class A misdemeanor if the value of the property stolen is $200 or more but less than $750;

(4) a felony of the third degree if:

(A) the value of the property stolen is $750 or more but less than $20,000, or the property is one or more head of cattle, horses, sheep, swine, or goats or any part thereof under the value of $20,000;

(B) regardless of value, the property is stolen from the person of another or from a human corpse or grave; or

(C) the value of the property stolen is less than $750 and the defendant has been previously convicted two or more times of any grade of theft; or

(5) a felony of the second degree if:

(A) regardless of the value, the property is:

(i) combustible hydrocarbon natural or synthetic natural gas, or crude petroleum oil;

(ii) equipment designed for use in exploration for or production of natural gas or crude petroleum oil; or

(iii) equipment designed for use in remedial or diagnostic operations on gas or crude petroleum oil wells;

(B) the value of the property stolen is $20,000 or more; or

(C) regardless of the value, the property was unlawfully appropriated or attempted to be unlawfully appropriated by threat to commit a felony offense against the person or property of the person threatened or another or to withhold information about the location or purported location of a bomb, poison, or other harmful object that threatens to harm the person or property or the person threatened or another person.

(f) An offense described for purposes of punishment by Subsection (e) of this section is increased to the next higher category of offense if it is shown on the trial of the offense that:

(1) the actor was a public servant at the time of the offense; and

(2) the property appropriated came into the actor's custody, possession, or control by virtue of his status as a public servant.

LOCAL COURT RULE OF THE FIFTH CIRCUIT COURT OF APPEALS

47.5.1 *Criteria for Publication.* The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion will be published if it:

establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

applies an established rule of law to facts significantly different from those in previous published opinions applying to the rule;

explains, criticizes, or reviews the history of existing decisional or enacted law;

creates or resolves a conflict of authority either within the circuit or between this circuit and another;

concerns or discusses a factual or legal issue of significant public interest;

is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

is accompanied by a concurring or dissenting opinion;

reverses the decision below or affirms it upon different grounds.

47.5.2 *Publication Decision.* An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication. The panel shall reconsider its decision not to publish an opinion upon the request of any judge of the court or any party to the case. The opinion shall then be published if, upon reconsideration, each member of the panel determines that it meets one or more of the criteria for publication or should be published for any other good reason.

47.5.3 *Unpublished Opinions.* Unpublished opinions are precedent. However, because every opinion believed to have precedential value is published, an unpublished opinion should normally be cited only when it (1) establishes the law of the case, (2) is relied upon as basis for res judicata or collateral estoppel, or (3) involves facts. If an unpublished opinion is cited, a copy shall be attached to each copy of the brief.